No. 83-2004

In the Supreme Court of the United States

OCTOBER TERM, 1983

MATSUSHITA ELECTRIC INDUSTRIAL CO., LTD., *et al.*,
Petitioners,

v.

ZENITH RADIO CORPORATION and
NATIONAL UNION ELECTRIC CORPORATION,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

~~**MOTION FOR LEAVE TO FILE SUPPLEMENTAL BRIEF**~~

and

SUPPLEMENTAL BRIEF OF PETITIONERS

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On July 17, 1984, after the filing of the petition for a writ of certiorari and the brief in opposition in this case, and just before the filing of petitioners' reply brief, respondents filed in this Court, without a motion seeking leave, an argumentative seven-page supplemental brief addressed to the merits of the brief amicus curiae filed by the Government of Japan. Respondents' supplemental filing contravenes the rules of this Court. The rules entitle respondents to file one 30-page brief in opposition, which they did on July 6, 1984. The rules do not grant parties the right to file supplemental briefs to dispute the substantive contentions set forth in briefs amicus curiae.

Respondents' pretext for filing their supplemental brief is that they did not previously have an opportunity to state "the reasons for withholding [their] consent" to the filing of the Government of Japan's amicus brief. (Supp. Br. 1). In fact, however, respondents did set forth their reasons for withholding consent in a two-page letter, dated July 3, 1984, addressed to counsel for the Government of Japan and filed with the Clerk of this Court. Respondents also implicitly argue that the amicus curiae brief of the Government of Japan constitutes an "intervening matter" under Rule 22.6 which respondents are entitled to bring to the Court's attention and to discuss in a supplemental brief. (Supp. Br. 1). Rule 22.6, however, cannot be given this suggested meaning without granting every party the opportunity to file a supplemental brief in response to every amicus brief submitted to this Court.

In short, respondents have filed a supplemental brief without warrant from the rules of this Court and have deprived petitioners of the opportunity to file a reply brief addressing all of respondents' substantive contentions. Under ordinary circumstances, we would therefore object to the filing of such a document. In this instance, however, the supplemental brief filed by respondents is so revealing of the fundamental defect in their position—and so well illustrates the need for review of the act of state and sovereign compulsion issues raised by the petition—that we do not oppose its filing.

If this Court accepts the supplemental brief filed by respondents, petitioners request an equal opportunity to address the subject discussed therein—*i.e.*, the significance of the amicus curiae brief of the Government of Japan to the issues raised by the petition.

Accordingly, petitioners respectfully request the Court's permission to file the attached supplemental brief addressed to the same matters discussed by respondents.

Respectfully submitted,

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SUPPLEMENTAL BRIEF OF PETITIONERS

1. Respondents' supplemental brief, attacking the amicus curiae brief of the Government of Japan, underscores the importance of the act of state and sovereign compulsion issues presented by the petition and the pressing need for this Court to review the judgments of the Court of Appeals. Having already denigrated the official Statement of the Government of Japan attesting that certain conduct challenged by respondents was mandated by the Japanese Government,[1] respondents now go so far as to suggest that

[1] Respondents characterize the Statement of the Japanese Government as a "note that three third-echelon employees of the Japanese Ministry of International Trade and Industry ("MITI") caused to be sent to the clerk of the District Court in 1975 . . ." (Opp. Br. 22), while the fact is that the "note" was twice officially transmitted to the District Court by the Embassy of Japan, once through the Department of State and once directly. (Pet. App. 6a-14a).

this Court not even permit the Government of Japan to make its views known in a brief amicus curiae.

There is no reasonable basis for denying the Government of Japan the right to address this Honorable Court.[2] The accusatory language and intemperate tone of respondents' supplemental brief—"Japan seeks to raise a false issue" (Supp. Br. 6), "[the Japanese Government Note Verbale is an] improper attempt to intrude into the judicial processes of the United States" (Supp. Br. 2, n.2)—plainly demonstrates that unless the courts adhere to the rule established by this Court in *United States v. Pink*, 315 U.S. 203, 220 (1942), they invite the very type of contentious disrespect for the statements and laws of a friendly foreign nation that the act of state doctrine was designed to prevent. That disrespect inevitably causes international tensions, and the views of the Government of Japan, as expressed in its amicus brief, are the best indication that those international tensions are present in this case. The amicus brief of the Japanese Government, explaining the effect of its own sovereign acts, should not only be received by this Court but should be given the same thoughtful consideration that the United States would expect to be given to its own formal representations in the courts of a foreign nation when its interests are involved.

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[2] Indeed, in 1978 this Court requested that foreign governments file briefs amicus curiae, when they wish to make their views known to the Court. *See* Department of State Circular Diplomatic Note to Chiefs of Mission in Washington, August 17, 1978, and Letter from the Solicitor General of the United States to the Legal Advisor of the Department of State, May 2, 1978, Dept. of State File Nos. P78 0154-2042 and P78 0185-0044.

2. Respondents' argument that "[t]he Court of Appeals' decision did not contradict any assertion contained in the MITI note" (Supp. Br. 3) is inconsistent with both the language and the necessary effect of the opinion below. As forcefully pointed out in the amicus curiae brief of the Japanese Government, the Court of Appeals failed to accept as conclusive the representation of the Japanese Government that the minimum price agreements and the JMEA regulations (of which the "five-company rule" was a part) were mandated by the Government of Japan pursuant to its trade policy. These rulings permit a factfinder to question the veracity of the Statement of the Government of Japan and clearly warrant review by this Court.

3. Respondents' claim that the Government of Japan "suggests that this case involves only" the activity of the Japanese petitioners within Japan is both disingenuous and misleading. (Supp. Br. 4). The amicus curiae brief of the Japanese Government, as well as the 1975 Statement and the 1984 Note Verbale, dealt exclusively with Japanese law, the sovereign acts of the Government of Japan regulating Japanese exports and the effect of those sovereign acts upon the Japanese petitioners. The Government of Japan has never "suggested" that "this case" involves only those matters or that the act of state and sovereign compulsion doctrines apply to anything other than government-mandated conduct controlling exports *from Japan*. What the Government of Japan and petitioners object to is the express holding of the Court of Appeals that *the Japanese Government-mandated export controls* could be a "feature" of an actionable antitrust conspiracy. (Pet. App. 167a-168a).

The Japanese Government, no less than the United States Government, is entitled to restrain and control the exportation of goods from its own territory. It is significant in this connection that the Government of the United States, in the exercise of its own sovereignty, controls the commercial activity of United States corporations and individuals with regard to exports from the United States. Unlike the Japanese Government export controls at issue in this case, export controls imposed by the United States have regulated commercial activity taking place completely outside United States territory.[3] There can be no question that a sovereign nation has the right to control the export activity of its own nationals.

4. Respondent's supplemental brief similarly mischaracterizes the brief of the Government of Japan as suggesting that only conduct compelled by the Japanese Government is involved in "this case." (Supp. Br. 4). Respondents argue that the Japanese petitioners have engaged in "other acts, as part of a

[3] The United States exercises mandatory control over United States exports to achieve foreign policy objectives. *See, e.g.*, section 6, Export Administration Act of 1979, as amended, 50 U.S.C. app. § 2405. This power has been used to control the activities of foreign-based subsidiaries and licensees of United States companies. *See, e.g.*, 15 C.F.R. § 385.2(c), revised, 47 *Fed. Reg.* 27250 (1982), rescinded, 47 *Fed. Reg.* 51858 (1982); *see also* Note, *Extraterritorial Application of United States Law: The Case of Export Controls*, 132 U. Pa. L. Rev. 355, 360, 369 (1984) (United States mandatory export regulation reaches not only "the export activities of American citizens and corporations, but also the export activities of foreign corporations owned or controlled by United States shareholders, including foreign subsidiaries of American corporations.").

broader scheme" (Supp. Br. 5) which were not compelled by their government and which are not, therefore, immune from antitrust liability. The amicus brief of the Government of Japan does not deal with such "other acts." Rather, the Japanese Government and petitioners contend that the act of state and sovereign compulsion doctrines apply only to the export control agreements and regulations mandated by the Japanese Government and that such immunized conduct "is not illegal, either standing alone *or as part of a broader scheme* itself violative of the Sherman Act." *United Mine Workers of America v. Pennington*, 381 U.S. 657, 670 (1965) (emphasis added).

CONCLUSION

It is therefore respectfully submitted that the petition for a writ of certiorari should be granted.

Dated: July 23,1984

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